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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

In re K.D., a Person Coming Under the  
Juvenile Court Law.

SOLANO COUNTY DEPARTMENT OF  
HEALTH AND SOCIAL  
SERVICES/CHILD WELFARE  
SERVICES,

Plaintiff and Respondent,

v.

NICOLE K.,

Defendant and Appellant.

A131149

(Solano County  
Super. Ct. No. J34577)

Nicole K. (mother) appeals from the order denying her Welfare and Institutions Code<sup>1</sup> section 388 petition and the order terminating her parental rights as to her daughter, K.D. She contends that the juvenile court abused its discretion in denying her section 388 petition for reinstatement of reunification services and that the court erred in finding that the sibling benefit relationship exception to adoption did not apply. We affirm.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

## **I. FACTUAL BACKGROUND**

This court has previously set forth the facts which brought K.D. within the jurisdiction of the juvenile court in our opinion on mother's petition for an extraordinary writ seeking to set aside the court's order setting a section 366.26 hearing. (*Nicole K. v. Superior Court* (Oct. 7, 2005, A111123) [nonpub. opn.] (*Nicole K.*)). The court sustained jurisdiction in this case based on mother's inability to care for her children, her homelessness, and her request that the Solano County Department of Health and Social Services (Department) take custody of K.D. and her two siblings, E.W., and J.C. (*Nicole K., supra*, A111123 at pp. 1-2.) Mother received over twelve months of reunification services including a parenting class, and assistance in searching for housing and employment, but at the time of the twelve-month review hearing, she had not visited with her children for several months, did not have stable housing, had failed to inform her social worker of her whereabouts, and had submitted a drug test that suggested adulteration. (*Id.* at pp. 2-3.) The Department therefore recommended that reunification services be terminated. (*Id.* at p. 3.) The court followed the Department's recommendation, terminated reunification services, and set the matter for a section 366.26 hearing. (*Id.* at p. 4.) This court denied mother's petition for an extraordinary writ, concluding that reasonable reunification services were provided and that substantial evidence supported the court's finding that it would be detrimental to return K.D. and her siblings to mother's care based on her failure to visit the children and to comply with her reunification plan, and her failure to appear at the twelve-month review hearing. (*Id.* at p. 6.)

The initial section 366.26 hearing was set for November 15, 2005, but the Department requested that the hearing be continued for six months. The Department reported that the current foster parents were not interested in adopting the children and that a prospective adoptive home had not been identified. Mother had not visited the children since early December 2004. The Department was considering a placement with

the maternal aunt who was also caring for the children's oldest sibling, A.G., who was a dependent of the court in Contra Costa County and in long-term foster care. The court continued the matter until May 16, 2006.

The Department's report for the May 16, 2006 hearing recommended that adoption continue to be the plan for the children and informed the court that the maternal aunt's home was being assessed for placement. The Department requested that parental rights not be terminated until the assessment was completed. The Department also reported that mother had given birth in March 2006 to T.E. and that mother had custody of the baby. Mother had not visited the children since December 2004. The court adopted the Department's recommendation and continued the section 366.26 hearing to December 19, 2006.

By December 19, 2006, however, the Department's report for the section 366.26 hearing noted that K.D.'s siblings, E.W., then age 6, and J.C., age 5, were having mental health issues. The report indicated that E.W. "may need some supportive services that therapy could provide" and that he had been referred to Solano County Children's Mental Health. The Department reported that J.C. "entered foster care as a severely distressed child. Since she has been in a home where her needs are met, she has learned not to fight with other children." The Department further stated that J.C. was still destructive to household furnishings. K.D., who was then age 3, was very bonded with her foster family, and there was no indication that she had any mental or emotional issues. The children were placed in the same foster home. The Department had concluded that placement with the maternal aunt would not meet the children's long-term needs but was now investigating the home of the children's maternal great aunt who had expressed interest in a plan of guardianship. The Department reported that the current foster parents, who had earlier expressed interest in adopting the children as a sibling group, had changed their minds. The Department, however, opined that it was likely that an adoptive placement could be found and thus recommended that parental rights not be

terminated. The court found that it was likely that the children would be adopted. The court opted not to terminate parental rights, finding that the children were difficult to place because they are members of a sibling group that should stay together.

The Department's report for the June 19, 2007 section 366.26 hearing stated that mother met with the Department in February 2007 and expressed interest in reuniting with her children. Mother denied having a drug problem and was living in Section 8 housing with her baby. The report noted that E.W. was undergoing mental health therapy to work on adjustment, school, and family functioning issues, and that both J.C. and K.D. were doing well in their foster care placement and did not appear to be in need of mental health therapy. The Department further explained that the children had been placed in a prospective adoptive home which had not worked out for them because E.W. had awoken during the night and urinated on his roommate. The prospective adoptive parent also reported that the children were very active. Consequently, the Department placed K.D. back with the foster care placement that the children had just left, and placed E.W. and J.C. in a home in which they had lived in March and April of 2004. Mother resumed supervised visitation with the children on April 24, 2007 and had two other visits with them in May. K.D. found mother to be a "nice lady" but did not understand that she was her birth mother. The Department reported that the children were adoptable due to their age and the lack of significant delays or behavior problems. It had not, however, located an adoptive placement, and since mother had resurfaced and appeared able to resume custody of children if services were offered, it recommended that the plan be changed from adoption to family reunification. The court adopted the Department's recommendation and ordered reunification services for mother.

The six-month status review hearing, which was scheduled for December 18, 2007, was not held until January 29, 2008. The Department recommended that reunification services be terminated. It reported that E.W. and J.C., who were living in the same foster care home, continued to have behavioral and mental health issues. Both

appeared to have minimal bonding with mother. K.D. was living in a separate foster home where she had lived for most of the past three years, and had not presented with any mental health issues. The Department conducted another adoptability review in November 2007, and the children were accepted for adoption planning, but a concurrent home had not been identified. Mother, meanwhile, tested positive for cocaine and cocaethylene in August 2007. The Department referred her to outpatient treatment with Project Aurora where she tested positive for cocaine in October 2007, and continued to test positive for cocaine on a weekly basis. Mother, however, engaged in regular, supervised visitation with the children. The Department recommended that reunification services be terminated as mother was actively using cocaine and not participating in the treatment program to which she was referred. The court terminated reunification services and set the matter for a section 366.26 hearing.

The Department's report for the May 19, 2008 section 366.26 hearing recommended that the hearing be continued because it had not located a potential adoptive placement for the children. The children were residing together in a foster home; but it was not a prospective adoptive placement. The court continued the hearing to November 18, 2008.

For the November 18, 2008 hearing, the Department recommended that the children's permanent plan be changed from adoption to legal guardianship. The Department was again considering placement with the maternal great aunt, who had moved back to California and had expressed interest in taking legal guardianship of the children. She was currently in the process of completing the requirements for home approval. The Department was also considering a social worker at the foster family agency who had worked with the children during the past year and who indicated that she would be interested in having the children placed with her in the event there was no other permanent plan for the children. While an adoptability review was completed in November 2007 showing that the children were adoptable, the Department did not

recommend terminating parental rights because the children had continued to visit with mother on a weekly basis. The Department had also not identified a permanent home for the children. The Department further reported that K.D.'s alleged father had requested a paternity test. The court adopted the Department's recommendations and ordered a paternity test for K.D.'s alleged father. The matter was continued to May 19, 2009.

On March 11, 2009, K.D.'s alleged father was excluded as K.D.'s biological father by DNA testing. The court dismissed him from the dependency proceeding.

The matter was again on the calendar for a section 366.26 hearing on May 19, 2009. The Department recommended that the children's permanent plan remain legal guardianship. The children had been placed in the home of the social worker with the foster family agency but the Department was planning to move them to the home of the children's maternal great aunt as the social worker was no longer interested in assuming legal guardianship of the children. The children continued to attend weekly supervised visits with mother; hence the Department opined that it was in their best interests to pursue a legal guardianship as the children were developing a relationship with mother. The maternal great aunt's home had been approved for placement. The court adopted the Department's recommendations and found that the most appropriate permanent plan for the children was guardianship.

On July 20, 2009, the Department removed the children from the maternal great aunt's home at her request. The maternal great aunt explained that she could no longer control the children's behavior and that J.C. had attempted to jump out of her car while she was driving on the highway. The Department returned the children to their former foster home. On August 24, 2009, E.W. was removed from that foster home and placed in another family foster agency home at the foster parent's request.

A status review hearing was held on November 17, 2009. The Department's report for the hearing recommended that the permanent plan for the children be changed to adoption. It reported that E.W.'s behavioral issues made it difficult to place him in the

same home as his sisters and that it had been unable to find a placement for the children. Mother continued to have supervised visitation with the children but missed on average two of her weekly visits per month. The Department further reported that the current caretakers for J.C. and K.D. were willing to adopt both girls if parental rights were terminated. The court set the matter for a section 366.26 hearing.

In early March 2010, J.C. and K.D. were moved to another foster home.<sup>2</sup> The Department's report for the March 25, 2010 section 366.26 hearing recommended that the hearing be continued for another six months to assess whether the plan should be adoption or legal guardianship for the children. Mother continued to visit with the children, however, she missed approximately 50 percent of scheduled visits. She was living in a one bedroom apartment with two children who were born after the inception of this case, and she was currently unemployed.

On March 12, 2010, mother filed a section 388 request to modify the court's order to reinstate reunification services. She alleged that she had made substantial progress on her substance abuse issues, had been sober since July 2009, and had maintained stable housing for approximately three years.

The Department opposed mother's section 388 petition, noting that mother failed to show up for drug testing on March 16, 2010, and was unavailable to permit an inspection of her home.

On March 23, 2010, the Department moved J.C. and K.D. into separate foster homes. The separation of the two siblings was necessary because J.C.'s behavior had been problematic and had affected her last two placements.

Mother tested positive for cocaine, benzoylecgonine, cocaethylene, and norcocaine on March 31, 2010. On April 9, 2010, mother withdrew her section 388

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<sup>2</sup> At this point, J.C. and K.D. had experienced living in seven foster care homes while E.W had lived in eight foster home placements.

petition. The court found that there was a probability that the children would be adopted and continued the matter to October 7, 2010 for a review under section 366.26, subdivision (c)(3).

Mother filed another section 388 petition asking for additional reunification services on October 6, 2010. Mother alleged that she enrolled in an outpatient substance abuse program on May 10, 2010, and was attending the program five days per week. She was also participating in regular NA meetings, parenting classes, and drug tests in connection with the program.

The Department opposed the motion, and recommended that the case be continued for six months as to E.W. and J.C. to determine whether legal guardianship was appropriate as their permanent plan. As to K.D., the Department recommended that mother's parental rights be terminated. The Department reported that both E.W. and J.C. continued to exhibit behavioral problems. K.D., in contrast, did not have any significant behavioral problems. Mother continued to have supervised visits with the children twice per month. The Department commented that the children were excited to see mother but did not appear to be sad after visits and that K.D. called her mother by her first name. The Department noted that the children's behavioral challenges made it difficult to find them an adoptive home. The Department was exploring the possibility of legal guardianship with E.W. and J.C. in their respective foster placements while K.D.'s foster parents were ready to adopt her. K.D.'s foster parents had known her for four years and felt that she was already a part of the family. They were motivated to adopt K.D. and were capable of meeting her needs. The Department recommended that mother's parental rights to K.D. be terminated and that K.D.'s permanent plan be adoption.

The court heard mother's section 388 petition on November 5, 2010. The court denied the section 388 petition as to K.D. and E.W., finding that it was not in their best interests to reinstate reunification services. The court further found that return of E.W. and J.C. to mother would be detrimental to their physical or emotional well-being, but



concluded that it would provide reunification services to mother regarding J.C. for a period of six months. As to E.W., the court found that the permanent plan of foster care with the goal of guardianship or safe return to mother was appropriate and continued the matter for a section 366.26 hearing for a period of 180 days. The court continued K.D.'s case for a contested section 366.26 hearing. Mother appeals the court's order on her section 388 petition as to K.D.

The section 366.26 hearing as to K.D. was held on January 18, 2011. The Department's social worker assigned to K.D.'s case testified that she was adoptable based on her age and her current prospective foster parents' willingness to adopt her. K.D. was also generally adoptable based on her health, physical appearance, and the lack of any mental health issues. The social worker further testified that K.D. had bonded with her foster parents with whom she had lived for about two years. K.D. considered mother to be a friend rather than a parent. The prospective foster parents had also indicated that they would facilitate continued contact with K.D.'s siblings and were willing to enter into a post-adoption visitation agreement.

The court terminated mother's parental rights as to K.D., finding that she was adoptable based on her young age, good behavior and present ability to bond with her caretakers who wished to adopt her. The court further found that it was no longer in K.D.'s best interests to treat her as a sibling unit at the cost of her achieving permanency. The court noted the long history of K.D.'s foregoing permanency to maintain the sibling unit and the futility of continuing those efforts. Finally, although the court encouraged the adoption of a post-adoption agreement, it did "not base its decision on the existence of post-adoption contact between [K.D.] and her siblings." Mother appeals the court's order terminating her parental rights.

## II. DISCUSSION

### A. Section 388 petition

Mother contends that the court abused its discretion in relying on a post-adoption contact agreement to deny her section 388 petition for reunification services as to K.D. She argues that remand is required so that the court can rule on the section 388 petition without giving weight to a post adoption agreement concerning sibling contact.

“Section 388 permits a parent to petition the court on the basis of a change of circumstances or new evidence for a hearing to change, modify or set aside a previous order in the dependency. The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child’s best interests. [Citation.]” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We may not disturb the decision of the juvenile court absent a clear showing that the court abused its discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Here, the court found that mother had shown a change of circumstances, but also found that reinstating reunification services would not be in the best interest of K.D. Substantial evidence supports the juvenile court’s decision. Not only had mother failed to reunify with K.D. during her initial dependency, she again failed to progress in reunification efforts when given an additional opportunity to reunify with K.D. in 2007. (*Nicole, supra*, A111123 at pp. 1-4.) Mother’s belated effort in 2010, more than six years after K.D. was removed from her custody, was far too late. While we commend mother for acknowledging her drug abuse and commencing treatment in May 2010,<sup>3</sup> K.D.’s need for stability and permanence outweigh mother’s interest in reunification. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Under the dependency scheme, “the parent is given a reasonable period of time to reunify and, if unsuccessful, the child’s interest in permanency and stability takes priority.” (*Ibid.*) “After the termination of reunification

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<sup>3</sup> Mother enrolled in Project Aurora, an outpatient substance abuse program in May 2010.

services, a parent's interest in the care, custody and companionship of the child is no longer paramount. [Citation.] Rather, at this point, the focus shifts to the needs of the child for permanency and stability.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) Here, the record demonstrates that K.D. needs a stable and permanent home. She is fortunate to have a prospective adoptive home with foster parents with whom she has lived for almost two years. K.D. has bonded with her foster parents and they wish to adopt her. K.D.'s need for stability and permanence outweigh mother's interest in another attempt at reunification. “At the point of these proceedings—on the eve of the section 366.26 permanency planning hearing—the [child's] interest in stability was the court's foremost concern and outweighed any interest in reunification.” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) Given the extensive and long history of this case, K.D. needs the opportunity she has now for an adoptive home with her prospective adoptive parents whom she considers her “dad and mom.” The court properly denied mother's request for additional reunification services.

Mother's reliance on *In re C.B.* (2010) 190 Cal.App.4th 102 for the proposition that the court erred in referring to a post adoption visitation agreement as one of the factors in making its decision to deny reunification services is misplaced. While the record reflects that the parties have approved a proposed post-adoption agreement to permit contact *between the siblings*, the record as a whole here does not support mother's request for reunification services at this late date. *C.B.* stands for the proposition that a court terminating parental rights cannot rely on a post adoption agreement to permit continuing parental contact. (*Id.* at p. 128.) “[T]he court cannot . . . terminate parental rights based upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the child and a biological parent . . .” (*Ibid.*) That the parties here plan to enter into a post adoption agreement to permit sibling visitation does not support mother's request for reunification services. (See *In re S.B.*

(2008) 164 Cal.App.4th 289, 300 [sibling relationships enjoy legal recognition after termination of parental rights].)

***B. Sibling relationship exception***

Mother contends that the trial court erred in terminating her parental rights because the sibling benefit relationship exception was established. We conclude that the court did not err in finding that it would not be detrimental to K.D.'s relationship with her siblings to terminate parental rights.

The Legislature has specifically addressed sibling relationships in the statutory provision setting forth the circumstances under which termination of parental rights would be detrimental to the child. Section 366.26, subdivision (c)(1)(B)(v) provides the court shall not terminate parental rights if: "There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

Under section 366.26, subdivision (c)(1)(B)(v), the court must first determine whether termination of parental rights would substantially interfere with the sibling relationship, and if so, the court must then weigh the child's best interest in continuing that relationship against the benefit of adoption. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951-952 [interpreting former section 366.26, subdivision (c)(1)E].) The parent bears the burden of showing the existence of a significant sibling relationship, the severance of which would be detrimental to the child. (*Id.* at p. 952.)

Here, the record documents the strong sibling relationship among K.D., J.C., and E.W. Indeed, it was the strength of the bond among the children and the Department's efforts to maintain the sibling group that had prevented the children from achieving

permanency. The Department strove to place the siblings together throughout the dependency process but the behavioral issues of both E.W. and J.C. ultimately resulted in the children being placed in separate foster homes. K.D. is now in a prospective adoptive placement with foster parents who wish to adopt her. K.D. also desires to be adopted by her current foster parents. As the trial court found “[i]t is no longer in [K.D.’s] best interests to treat her as a sibling unit at the cost of her achieving permanency. The case has a long history of [K.D.’s] foregoing permanency to maintain the sibling unit. The current circumstances demonstrate the futility of continuing those efforts.”<sup>4</sup>

While the record reflects a strong relationship among the siblings, as the court found, that relationship does not support applying the statutory exception to termination of parental rights where to do so would frustrate K.D.’s opportunity to achieve the permanency she deserves. (See *In re Celine R.* (2003) 31 Cal.4th 45, 53.) “ ‘Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ ” (*Id.* at p. 52, quoting *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) “[T]he sibling relationship exception permits the trial court to consider possible detriment to the child being considered for adoption, but not a sibling of that child. . . . Nothing in [section 366.26] suggests the Legislature intended to permit a court to not choose an adoption that is in the adoptive child’s best interest because of the possible effect the adoption may have on a sibling.” (*In re Celine R.*, *supra*, 31 Cal.App.4th at p. 54.) As the court found, the benefits to K.D. of achieving permanency outweighed any interference with her sibling relationships.

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<sup>4</sup> Nonetheless, we note that the record reflects that ongoing contact with K.D. and her siblings will continue. The record indicates that the current foster parents of the children understand the importance of sibling relationships and are committed to the children having contact with their siblings. Counsel for K.D. testified at the section 366.26 hearing that a proposed post-adoption agreement had been circulated and approved which offered a “a great deal of contact with both [K.D.’s] mother and her siblings.”

### **III. CONCLUSION**

The orders denying mother's section 388 petition and terminating her parental rights are affirmed.

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RIVERA, J.

We concur:

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REARDON, ACTING P. J.

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SEPULVEDA, J. \*

\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.